

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

Petition for Emergency Declaratory Ruling of)
IHS Markit Ltd.)

CG Docket No. 02-278)
)

**COMMENTS OF ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AND
ALLIANCE OF AUTOMOBILE MANUFACTURERS**

Scott D. Delacourt
Kathleen E. Scott
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
sdelacourt@wileyrein.com
Counsel, Global Automakers

Charles Haake
Assistant General Counsel
Association of Global Automakers, Inc.
1050 K Street NW, Suite 650
Washington, DC 20001

Jessica Simmons
Assistant General Counsel
Alliance of Automobile Manufacturers
803 7th Street NW, Suite 300
Washington, DC 20001

November 5, 2018

I. INTRODUCTION & SUMMARY

The Association of Global Automakers, Inc. (“Global Automakers”) and the Alliance of Automobile Manufacturers, Inc. (“Auto Alliance”) respectfully submit these comments in support of the above-referenced Petition for Emergency Declaratory Ruling (the “IHS Petition”) of IHS Markit Ltd. (“IHS”), which asks the Federal Communications Commission (“FCC” or “Commission”) to “clarify on an emergency basis that motor vehicle safety recall-related calls and texts are ‘made for emergency purposes’ and thus exempt from the [Telephone Consumer Protection Act’s (“TCPA”)] wireless calling restrictions.”¹

Global Automakers and the Auto Alliance are trade associations that collectively represent nearly every automaker building and selling cars and light trucks in the United States.² Both trade associations work with industry leaders, legislators, regulators, and other stakeholders in the United States to advance public policy that improves motor vehicle safety, among other objectives. The IHS Petition provides the FCC with the opportunity to help improve motor vehicle safety by clarifying that the TCPA does not prohibit auto industry stakeholders from reaching out to consumers via phone and text to inform them of vehicle safety recalls, even where consumers have not provided prior express consent for such communications. We urge the Commission to take this important step, which is consistent with the statutory language and

¹ IHS Markit Ltd. Petition for Emergency Declaratory Ruling, CG Docket No. 02-278, at ii (filed Sept. 21, 2018) (“*IHS Petition*”).

² Global Automakers’ members include American Honda Motor Co., Aston Martin Lagonda of North America, Ferrari North America, Hyundai Motor America, Isuzu Motors America, Kia Motors America, Maserati North America, McLaren Automotive, Nissan North America, Subaru of America, Suzuki Motor of America, and Toyota Motor North America. Auto Alliance members are BMW Group, FCA US, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Cars of North America.

congressional intent of the TCPA; the Commission’s TCPA rules and precedent; and the Commission’s charge to act in the public interest.

II. THE AUTO INDUSTRY IS DEDICATED TO ENSURING MOTOR VEHICLE SAFETY AND IS WORKING TIRELESSLY TO MAXIMIZE SAFETY RECALL PARTICIPATION RATES.

For automakers, public safety is a top priority. The auto industry has been and continues to be dedicated to ensuring that all vehicles on the road are as safe as possible. Vehicle safety recalls are an important part of this mission.

In 2016, the U.S. Department of Transportation (“DOT”), the National Highway Traffic Safety Administration (“NHTSA”), and 18 automotive manufacturing companies, including several Global Automakers and Auto Alliance members, “reaffirmed [their] resolve to leverage [their] collective strength and knowledge to work collaboratively, consistent with the law, to further enhance the safety of the traveling public” with the *Proactive Safety Principles 2016* (“*Proactive Safety Principles*”).³ Among the four principles identified therein is a commitment to maximize safety recall participation rates. With an objective to “[e]xplore and employ new ways to increase safety recall participation rates by the public by working toward the aspirational goal of 100 percent participation,”⁴ the *Proactive Safety Principles* set forth several guidelines for implementing this commitment:

- “Share industry best practices, tactics and policies based on lessons learned from ongoing safety recalls and increase safety recall participation by motor vehicle owners.”
- “Leverage best practices identified to increase public awareness of ongoing recalls that increase safety recall participation.”
- “Invite other stakeholders, including but not limited to, consumers, new and used vehicle retailers, insurers, and state legislators and DMVs, to collaborate with

³ *Proactive Safety Principles 2016*, U.S. DOT (Jan. 15, 2016), available at <https://www.transportation.gov/briefing-room/proactive-safety-principles-2016>.

⁴ *Id.*

automakers and NHTSA to improve safety recall participation rates, with a particular focus on older vehicles.”⁵

Global Automakers and the Auto Alliance work closely with NHTSA and our member companies to maximize safety recall participation rates, including through the sharing of industry best practices, tools, and processes to ensure effective recall campaigns. As IHS explains, unrepaired vehicles subject to safety recalls represent an “unreasonable risk of accidents.”⁶ As such, maximizing safety recall participation rates, aspirationally to 100 percent participation, will dramatically increase motor vehicle safety.

Because all vehicle safety recalls by definition involve a risk to vehicle safety and need to be addressed and taken seriously, the auto industry goes to great lengths to notify affected consumers about safety recalls. In addition to electronic outreach methods, some automakers have been evaluating neighborhood canvassing—i.e., knocking on doors to help consumers become aware of life-saving notifications and information. In connection with the Takata Recall discussed in the IHS Petition, Honda, a Global Automakers member, reports that:

The owner of a 2001 Honda Civic was surprised to find a “Honda Recall Pit Crew,” attending the yard sale in his driveway. But the Honda crew wasn’t there in search of furniture or children’s toys; they wanted the owner to complete the recall of the defective Takata airbag inflator in his Honda car, and save him from potential injury or death.⁷

⁵ *Id.*

⁶ See *IHS Petition* at 4 (“In essence, vehicle safety defects reported by automobile manufacturers ‘in good faith’ pursuant to their statutory obligations reflect the experience of manufacturers and their judgment that affected vehicles could cause unreasonable risks of accidents, if not repaired. Any motor vehicle safety recall ordered by NHTSA likewise necessarily reflects the agency’s considered judgment, informed by evidence of serious safety risks including information and arguments that interested persons or manufacturers themselves may wish to present. Excluded from such motor vehicle safety recalls are low-risk equipment problems or mere cosmetic issues, such as paint chipping, that might motivate other manufacturer-initiated recalls that are not related to safety risks.”) (citation omitted).

⁷ *Honda Going Door-to-Door to Complete Alpha Inflator Recalls*, Honda Airbag Inflator Recall Center (Aug. 29, 2017), <http://hondaairbaginfo.com/honda-going-door-to-door-to-complete-alpha-inflator-recalls/>.

In a continuing effort to increase consumer participation in vehicle recalls, the Auto Alliance, Global Automakers, and CARFAX have also partnered to launch a new tool that allows commercial and governmental entities, including state departments of motor vehicles, state vehicle registrars, state vehicle inspection programs, motor vehicle insurers, auto finance companies, motor vehicle dealers, vehicle fleet program managers, automotive parts recyclers, and vehicle auction companies, to search for open recalls for thousands of vehicles at once, free of charge. The tool performs large batch searches of vehicle identification numbers to help these entities that routinely interact with the public to remind drivers of open recalls. This tool will supplement the extensive efforts by individual automakers and the industry to inform the public about getting vehicle recalls remedied.

Despite the industry's best efforts, however, recall participation rates are about 67% for the auto industry overall according to NHTSA estimates,⁸ and it is increasingly difficult for automakers to track down owners of older vehicles, especially when the vehicle has changed hands many times. That is why the current petition is so important for auto safety. Modern communications technologies present an opportunity to improve safety recall participation rates in pursuit of the aspirational 100% goal. Social media posts, emails, and text messages can be helpful tools for automakers to promote safety. Automated calling equipment is another such technology that can greatly assist the auto industry in maximizing safety recall participation rates, and thus increasing motor vehicle safety.

⁸ See *Report to Congress: "Vehicle Safety Recall Completion Rates Report"*, NHTSA (May 2017), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13376-recall_completion_rates_rtc-tag_final.pdf.

III. THE RELIEF SOUGHT BY THE IHS PETITION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE, THE FCC’S TCPA RULES, AND COMMISSION PRECEDENT, AND IT WILL PROMOTE THE PUBLIC INTEREST BY HELPING TO ENSURE VEHICLE SAFETY.

The TCPA prohibits calls and texts “using any automatic telephone dialing system or an artificial or prerecorded voice” to wireless numbers unless (1) the person making the call has “the prior express consent of the called party” or (2) the “call [is] made for emergency purposes.”⁹ The IHS Petition asks the Commission to confirm that vehicle safety recall calls and texts are “made for emergency purposes” such that these calls and texts fall outside of the scope of the TCPA prohibition, “even absent prior express consent of called parties.”¹⁰ Global Automakers and the Auto Alliance urge the Commission to expeditiously grant this request, as it is in line with both the plain language of the statute and with the Commission’s own rules and precedent. More importantly, grant of the IHS Petition will help to save lives—and thus promote the public interest—by allowing the auto industry to use every tool at its disposal—including automated calling equipment—to maximize safety recall participation rates. Such calls and text messages would also further a key priority of the DOT when it comes to increasing public awareness regarding open recalls which are then fixed free of charge.

The plain language of the TCPA supports grant of the IHS Petition. The prohibition against autodialed or artificial or prerecorded voice calls to wireless numbers is explicitly for calls *not* made for emergency purposes:

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—to make any call **(other than a call made for emergency purposes** or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—. . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio

⁹ 47 U.S.C. § 227(b)(1)(A).

¹⁰ *IHS Petition* at 9.

common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States.¹¹

It is clear from this language that Congress did not intend to limit calls—such as vehicle safety recall calls and texts—that are necessary for emergency purposes, including airbag safety recalls.

The FCC’s TCPA rules define the term “emergency purposes” to mean “calls made necessary in any situation affecting the health and safety of consumers.”¹² Commission guidance regarding the emergency purpose exception to the wireless number prohibition is consistent with this definition.¹³ For example, in 2016, the Commission held that calls from schools regarding “emergencies including weather closures, fire, health risks, threats, and unexcused absences” were included under the emergency purposes exception.¹⁴ There the Commission made clear that the emergency purposes exception did not encompass “every automated call made by an educational organization,”¹⁵ but instead, encompassed only calls “made necessary by a situation affecting the health and safety of students and faculty.”¹⁶ In line with this guidance, the relief sought in the IHS Petition is narrowly tailored: the IHS asks the Commission to confirm that

¹¹ 47 U.S.C. § 227(b)(1)-(A)(iii) (emphasis added). Calls to other telephone lines are included in this prohibition, including calls to “any emergency line” and calls to “the telephone lines of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment.” *Id.* § 227(b)(1)(A)(i)-(ii).

¹² 47 C.F.R. § 64.1200(f)(4).

¹³ *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, 7 FCC Rcd. 8752, ¶ 51 (Oct. 16, 1992) (Report and Order) (concluding that calls from utilities to customers regarding service outages and interruptions are covered under the “broad exemption for emergency calls”).

¹⁴ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Blackboard, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, 31 FCC Rcd. 9054, ¶ 17 (Aug. 4, 2016) (Declaratory Ruling).

¹⁵ *Id.* ¶ 18.

¹⁶ *Id.* ¶ 20.

“safety recall-related communications,” not all calls and texts made by automakers, are “made for emergency purposes.”¹⁷

It is clear that maximizing vehicle safety recall participation rates is in the public interest: increased participation translates into lives saved. This reality is reflected in the concerted effort on the part of Congress and the DOT, with the help of the auto industry, to improve recall participation and completion rates.¹⁸ Granting the IHS Petition will aid in the effort to improve these rates by allowing those entities reaching out to consumers regarding recalls to use every tool in the toolbox—including modern calling equipment—to deliver life-saving information.

Clarifying that motor vehicle safety recall-related calls and texts are exempt from the TCPA’s prohibitions (1) is in line with the plain language of the statute, (2) is consistent with Commission precedent, and (3) will further the public interest. Accordingly, there is no reason that the Commission should not expeditiously grant the IHS Petition.

IV. THE AUTO INDUSTRY SHOULD NOT BE EXPOSED TO TCPA LIABILITY WHEN REACHING OUT TO CONSUMERS TO ENSURE VEHICLE SAFETY.

The liability associated with TCPA violations is notoriously high. The statute creates a private right of action that is coupled with steep statutory damages—from \$500-\$1500 per violation, measured on a per call or per text basis.¹⁹ In part because of these steep statutory damages, TCPA cases have skyrocketed in recent years.²⁰ A study that tracked 3,121 TCPA

¹⁷ *IHS Petition* at ii.

¹⁸ See, e.g., *Report to Congress: “Vehicle Safety Recall Completion Rates Report”*, NHTSA (May 2017), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13376-recall_completion_rates_rtc-tag_final.pdf; Comments of Alliance of Automobile Manufacturers & Global Automakers, Retooling Recalls, NHTSA Docket 2015-0038 (May 29, 2015), <https://www.globalautomakers.org/OldSiteContentAssets/letter/Global-Automakers-Auto-Alliance-Comments-to-NHTSA-on-Retooling-Recalls-Workshop-assets/comments-re-nhtsa-retooling-recalls-workshop-may-29-2015-pdf>.

¹⁹ 47 U.S.C. § 227(b)(3).

²⁰ *Abusive Robocalls and How We Can Stop Them: Hearing Before the S. Comm. On Commerce, Sci., & Transp.*, 115th Cong. (2018) (statement of Scott Delacourt, Partner, Wiley Rein LLP on

claims filed from July 2015 to December 2016 showed that over 1,000 of those cases “were brought as putative class actions seeking statutory damages ranging from tens of millions to billions of dollars.”²¹

Even with good faith efforts, because both wireless phone numbers and vehicles frequently change hands without automakers’ knowledge, there is an ongoing risk of lawsuits unless the Petition is granted. Automakers should not have to risk such high liability every time they attempt to reach out to consumers with information related to vehicle safety recalls. This type of disincentive to communicate life-saving information with safety recall calls and texts goes against “Congress’s intent to promote public safety and avoid penalizing callers that seek to warn consumers of situations affecting their health or safety.”²² Modern technologies described in the IHS Petition can effectively increase recall participation rates; certainly, there is no good

behalf of the U.S. Chamber Inst. for Legal Reform), *available at* https://www.commerce.senate.gov/public/_cache/files/7b94454d-d7c5-4231-ad32-e53f8080685f/1CC011A5182712349A0BA4D900AA2974.april-18-2018---abusive-robocalls-and-how-we-can-stop-them---delacourt-testimony.pdf (“[T]he number of TCPA case filings exploded to 4,860 in 2016, and TCPA litigation grew 31.8% between 2015 and 2016. Much of this litigation targets legitimate companies – many of which are well-known brands – that have committed marginal or unavoidable violations, instead of the true bad actors: scam telemarketers, offshore operations, and fraudsters who operate through thinly-capitalized and disappearing shell companies. These latter activities are of little interest to class-action lawyers.”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; Declaratory Ruling and Order, 30 FCC Rcd. 7961 (July 10, 2015) (Pai Dissent) (“The TCPA’s private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target. As Adonis Hoffman, former Chief of Staff to Commissioner Clyburn, recently wrote in *The Wall Street Journal*, a trial lawyer can collect about \$2.4 million per suit by targeting American companies. So it’s no surprise the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.”).

²¹ *TCPA Litigation Sprawl*, U.S. Chamber Inst. for Legal Reform, at 2, 8 (Aug. 2017), https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

²² *IHS Petition* at ii.

reason to expose automakers to TCPA liability where safety and health considerations warrant outreach by calls or texts.

Global Automakers and the Auto Alliance urge the Commission to take this opportunity to support the goal of maximizing vehicle safety and recall participation rates and to clarify that TCPA consent requirements do not apply to vehicle safety recall calls and texts. Lack of clarity regarding TCPA liability for vehicle safety recall messages has had a chilling effect on these important communications between OEMs and their customers. Only clear guidance from the Commission can eliminate this barrier and facilitate outreach regarding this important public safety matter using all available technology.

V. CONCLUSION

For the foregoing reasons, Global Automakers and the Auto Alliance urge the FCC to “clarify on an emergency basis that motor vehicle safety recall-related calls and texts are ‘made for emergency purposes’ and thus exempt from the TCPA’s wireless calling restrictions.”²³

Respectfully Submitted,

Scott D. Delacourt
Kathleen E. Scott
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
sdelacourt@wileyrein.com
Counsel, Global Automakers

/s/ Charles Haake
Charles Haake
Assistant General Counsel
Association of Global Automakers, Inc.
1050 K Street NW, Suite 650
Washington, DC 20001

Jessica Simmons
Assistant General Counsel
Alliance of Automobile Manufacturers
803 7th Street NW, Suite 300
Washington, DC 20001

Filed: November 5, 2018

²³ *Id.*